79-1444

Supreme Court, U. S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner
of Education of the State of New York,
and the President and Board of Trustees
of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Petition for a Writ of Certiorari to The Court of Appeals of the State of New York

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MILTON HOROWITZ
Counsel for Petitioner
15 Park Row
New York, N.Y. 10038
(212) CO 7-0606

DICK BAILEY PRINTERS, 290 RICHMOND AVENUE, S.I., N.Y. 10302
TELEPHONE: (212) 447-5358

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Frances Leto Zangrillo, prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of New York, Appellate Division, Third Department, entered June 4th, 1979, affirming the judgment herein dated March 8th, 1978 of said Supreme Court, held in and for the County of Albany; and the decision of the Court of Appeals of the State of New York, dated December 17, 1979, denying petitioner permission to appeal thereto from said Appellate Division order of affirmance.

OPINIONS BELOW

There are no appellate opinions herein. The New York Court of Appeals decision herein of December 17, 1979 denying petitioner's motion for permission to appeal thereto is not yet published. The decision of the Supreme Court of the State of New York, Appellate Division, Third Department, herein of May 17, 1979 which, without opinion, affirmed the trial court judgment is reported at 70 AD2d 790; 416 N.Y. Supp. 2d 159. The Special Term memorandum decision herein of Supreme Court, Albany County of March 3, 1978 has not been reported. However the administrative adjudication reviewed by Special Term, viz., the New York State Commissioner of Education's Decision No. 9511, is officially reported in the New York State Education Department Reports at 17 Ed. Dept. Rep. 98.

Copies of the New York Court of Appeals decision denying petitioner permission to appeal of December 17, 1979, the Appellate Division's order of affirmance dated June 4, 1979, and the Special Term judgment of dismissal herein dated March 8, 1978 are set forth in that order in Appendix A of this petition.

Copies of the decision of unanimous affirmance without opinion of the Appellate Division dated May 17, 1979, the memorandum decision herein of Special Term dated March 3, 1978, and the Commissioner's Decision No. 9511 of September 28, 1977, are set forth in that order in Appendix B of this petition.

JURISDICTION

The decision of the Court of Appeals of the State of New York was made on December 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. Was it a violation of petitioner's procedural due process rights under the Fourteenth Amendment of the Constitution of the United States for the State to successively deny her both an administrative and a judicial review of the merits of her colorable claims seeking remediation for her respondent public employer's violation of her property rights as a statutorily tenured teacher by summarily terminating her at the end of a semester's resummption of teaching following an overstayed maternity leave?

It is undisputed that petitioner's departmental chairman had promised her the first full-time position to open in the department if petitioner would, in the meantime, accept a part-time teaching assignment on faculty, and petitioner agreed.

II. Was it a violation of petitioner's substantive due process rights under the Fourteenth Amendment of the Constitution of the United States for respondent State community college to have summarily terminated petitioner, without charges or hearing and contrary to the explicit provisions of the special tenure statute applicable to that public employer, for the purpose of making way for the advancement of untenured part-time and evening personnel?

At the time of termination petitioner was told she was being laid off for lack of available work—permissible under the tenure statute. But years later a memorandum to the college president was discovered to her which baldly stated the real, illicit reason for the termination,

> "* * * Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home. The other Part-Time members of the department were felt to have seniority if any full-time openings became available * * *. In addi-

tion, several evening instructors had been offered daytime teaching opportunities as they became available and were being trained to come in. * * *"

REASON FOR GRANTING THE WRIT

This is a case where a state court has decided a federal constitutional question of substance, *viz.*, the right of a statutorily tenured teacher in public employment to be protected against summary termination without hearing or charges, and to an administrative or judicial review of the merits of such termination, all answered negatively and probably not in accord with applicable decisions of this Court, e.g., *Connell v. Higginbotham,* 403 U.S. 207 (1971); *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972).

CONSTITUTIONAL PROVISION AND STATUTES WHICH THE CASE INVOLVES

United States Constitution; U.S.C. Constitution, Amend. 13-14, page 33:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

* * *

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED; BOOK 16, EDUCATION LAW

Article 52, CITY SCHOOL DISTRICTS;

§2587. Tenure in fashion institute of technology

1. The following words and phrases, as hereinafter used, and for the purposes of this section, shall have the following meanings:

a. "Community college" shall mean fashion institute of technology, a community college sponsored by the board of education of the city of New York.

b. "Board" shall mean the board of trustees of fashion institute of technology.

c. "Instructional staff" shall mean the persons employed in the community college in the positions of president, dean, director, assistant dean, assistant director, chairman of department or division, senior instructor, instructor, lecturer, college registrar, college bursar, laboratory technician, college administrative assistant, instructor technologist, college librarian, assistant librarian; or in any position which the board in its discretion may add thereto.

d. "Tenure" shall mean the right of a person to hold his position during good behavior and efficient and competent service, and not to be removed therefrom except for cause in the manner hereinafter provided.

* * *

8. A position held by a person upon whom tenure is conferred through the operation of this section may be

abolished or discontinued by the board for reasons which are not discriminatory against a particular person or persons. In the event that a position in a specified subject is to be abolished or discontinued, such position shall be that of the person last appointed to such position; provided, however, that all persons in such position upon whom tenure is not conferred by the operation of this section shall be dismissed before the position of any other person in such subject is abolished or discontinued. If the board abolishes or discontinues the position of a person upon whom tenure is conferred through the operation of this section and can find no position in the community college which can be efficiently and capably filled by such person, then his name shall be placed and shall remain for three years on a preferred eligible list of candidates for reappointment to fill a vacancy that may thereafter occur in a position which can be efficiently and capably filled by such person or to fill a newly created position which can be efficiently and capably filled by such person. Reappointment from such preferred eligible list to a position in a specified subject shall be made in the order of the original appointment of the persons on such preferred eligible list. Any person reappointed from such preferred eligible list shall be reappointed at a salary not less than that which he was receiving when his position was abolished or discontinued. Any person whose name is placed on such preferred eligible list as hereinbefore provided shall, for the purpose of maintaining his status in any retirement system of which he is a member, be deemed to be on leave of absence without pay.

9. Persons granted tenure under the provisions of this section shall not be removed except for cause, after a hearing and by a majority vote of the board. Charges against a person entitled to tenure under the provisions of this section may be preferred by the president, any member or members of the board, or the board itself. Such charges

and all specifications of such charges shall be filed with the board, which shall cause a copy thereof to be served upon the person accused, and such person shall have ten days from the date of the service of such charges and specifications, or such additional time as may be granted him by the chairman of the board, in which to file an answer in writing with the board. Any person against whom charges as herein provided are filed with the board, may be suspended with or without pay by the president pending a final determination of such charges by the board. The board shall proceed to try and determine such charges either by the board, or by a trial committee consisting of one or more members of the board, or by a trial committee consisting of one or more persons specially appointed for such purpose by the board, and the board shall fix the penalty or punishment, if any, to be imposed for the offense, and such penalty or punishment may consist of a reprimand, a fine, suspension for a fixed time without pay, or dismissal; provided, however, that a vote of a majority of all the members of the board shall be necessary to impose a penalty or punishment. The report of any trial committee holding such trial shall be subject to final action by the board, each member of which shall before voting read the testimony and the evidence in the case. The board may reject, confirm or modify the conclusions of the trial committee, and the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter. In case the charges preferred against any person are dismissed, he shall be restored to his position with full pay for the period of his suspension. In all trials and investigations authorized by this section all testimony taken shall be under oath, which the chairman of the board or the chairman of the trial committee is hereby authorized to administer. For the purpose of any in-

vestigation, trial or hearing, the chairman of the board or the chairman of the trial committee shall have power to subpoena witnesses, papers and records. The Supreme Court shall have power, upon the application of the chairman of the board or the chairman of the trial committee, to compel any witness who may be summoned, to appear and testify before said board or trial committee.

Added L. 1957, c. 429, eff. April 12, 1957.

Education Law, Article 7—COMMISSIONER OF EDUCATION;

§305. General powers and duties.

The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

* * *

L. 1947, c. 820, eff. July 1, 1947.

§308. Other powers

The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

L. 1947, c. 820, eff. July 1, 1947.

§310. Appeals or petitions to commissioner of education and other proceedings.

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same and the commissioner of education may also in-

stitute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty-one hundred sixty four of the public health law.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

L. 1947, c. 820, eff. July 1, 1947. Amended L. 1976, c. 857, §1, eff. Oct. 24, 1976; L. 1979, c. 443, §5, eff. July 1, 1980. The 1979 amendment added subsection 6-a.

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED BOOK 7B, CIVIL PRACTICE LAW AND RULES

ARTICLE 56, APPEALS TO THE COURT OF APPEALS

§5601. Appeals to the court of appeals as of right

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

* * *

§5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by

permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally deterines the action and which is not appealable as of right, * * *

* * *

ARTICLE 55, APPEALS—GENERALLY

§5520. Omissions; appeal by improper method

* * *

(b) Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

* * *

Civil Rights Law of 1871; 42 U.S.C. §1983.

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979. Derived from Act Apr. 20, 1871, c. 22, §1; 17 Stat. 13.

STATEMENT OF THE CASE

The record will disclose that the operative facts of the case are largely undisputed and matters of documentary record.

Petitioner joined the faculty of respondent Fashion Institute of Technology ("FIT") in September 1956 on the second of eight salary steps for Instructor in transferring from a New York City public high school. She taught there continuously full-time thereafter, being given a Certificate of Permanent Tenure on May 15, 1962, and was on the eighth, highest step of the Instructor rank—then equivalent to the third salary step of the rank of Assistant Professor—from September 1962 until she went out on maternity leave effective February 1st, 1963. The maximum maternity and child care leave at that time consisted of one year's leave and one year's extension which she duly requested. Petitioner continued to stay home after January 31, 1965, but in the summer of 1967 she advised the FIT authorities she was ready to resume full time teaching there. On the promise of her department chairman that if petitioner would return to part-time teaching, she would be given the first full-time opening that presented, and, upon certification of FIT's then president to its Board of Trustees, she was restored to staff as an adjunct assistant professor teaching a part-time program in the September 1967 semester, only to be dropped from staff at the end of January 1968 on the pretext that no work was available to her, while the concealed but explicit reality was that she was being dropped to make way for the advancement of untenured people more favored in collective bargaining. Not giving up and persistent in her inquiries for and about the availabilities of work at FIT, petitioner, who had gotten a New York City public high school teaching job starting September 1968, finally retained counsel to assist her in getting reinstated to FIT

faculty. With such assistance petitioner was finally reinstated—for the second time—starting February 1973 as an assistant professor "with a continuation of tenure and seniority." Receiving the pay for the first step of the rank of assistant professor rather than for the fourth step to which she deemed herself entitled, petitioner invoked the grievance procedure provided by collective bargaining culminating in an arbitration proceeding in which her union declined to represent her.

It was only in the course of the arbitration proceeding that an FIT memorandum dated June 22, 1972, drawn to assist the college president in considering petitioner's 1972 application for reinstatement, but relating the reasons for her being dropped from faculty as of January 31st, 1968 was discovered to her from FIT's files. A copy of that memorandum of June 22, 1972 is annexed as Appendix C to this petition. Within a few weeks of that discovery, the arbitrator made his adverse arbitration award dated March 22, 1976.

Claiming violation of her tenure rights under Education Law §2587 (8) and (9) as evidenced by the newly discovered memorandum of June 22, 1972, and praying for "make whole" remediation in rank, pay and back pay from February 1st, 1968, petitioner instituted her administrative appeal under Article VII of the Education Law to respondent Commissioner of Education of the State of New York by petition dated and verified May 4, 1976. There it tarried until September 28, 1977 when the Commissioner made his Decision, copy annexed in Appendix B hereto, dismissing the petition on the ground that he had no jurisdiction, under the doctrine of *Matter of Bowen v. Allen,* 17 AD2d 12, 230 N.Y. Supp. 2d 578 (Appellate Division, 3rd Dept. 1962), *affd. without opinion,* 13 NY2d 663 (1963), to review the matter;

"* * * I conclude that Fashion Institute of Technology is a community college, the actions of which are not subject to review by the Commissioner pursuant to section 310 of the Education Law * * *."

Petitioner next brought a statutory mandamus proceeding against respondents to review and reverse the Commissioner's Decision in the Supreme Court of the State of New York, Albany County. In the petition to that Court, two causes of action were pleaded. The first cause of action sought remand of the matter to the Commissioner with the mandate that he take jurisdiction and decree relief. The second cause of action pleaded was in the alternative;

"FOR A SECOND CAUSE OF ACTION AGAINST RESPONDENT PRESIDENT AND BOARD OF TRUSTEES OF THE FASHION INSTITUTE OF TECHNOLOGY

13. In the event it should be determined that the Commissioner's rejection of jurisdiction herein may not be nullified and set aside, then petitioner, reiterating the allegataions of this petition as though herein set forth fully and at length, claims the right to proceed directly in this Article 78 CPLR proceeding—or amending the same into the format of an action—against respondent President and Board of Trustees of Fashion Institute of Technology, for so much of the relief prayed for herein as would make petitioner whole for violation of her tenure rights under §2587 of the Education Law by said respondent F.I.T. and for its continuing refusal to accord her such rights, all of which acts of refusal and noncompliance with law are capricious, arbitrary, unreasonable and illegal and for all of which court relief no prior application has ever been made."

After argument at Special Term, Supreme Court, Albany County made its memorandum decision of March

3, 1978 herein, copy appended in Appendix B, concluding that:

"* * * the Commissioner's decision with regard to his lack of jurisdiction under Section 310 may not be set aside. aside.

"The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction under those sections may not be said to be arbitrary and capricious.

"The petition is dismissed. Submit judgment."

The Special Term final judgment of dismissal, signed by the Court as submitted by the Commissioner, copy appended in Appendix A hereto, went beyond jurisdictional dismissal and dismissed the petition, inclusive of petitioner's second cause of action, on the merits.

On appeal to the Appellate Division, Third Department, petitioner now urged, in addition to the claimed violations of procedural and substantive rights under Education Law §2587, the statutory duty of the Commissioner to exercise a remediating jurisdiction in the case, and the violation of petitioner's Fourteenth Amendment due process rights, that, were the judgment to stand, both petitioner and the statute would be deprived of any means of enforcing the rights and benefits clearly intended to be conferred by the statute. The upshot was the unanimous decision of the Appellate Division of May 17, 1979 affirming the Special Term judgment without opinion, copy appended in Appendix B hereto. The Appellate Division order of affirmance dated and entered June 4, 1979, copy appended in Appendix A to this petition, coupled with the Court of Appeals of the State of New York decision of December 17, 1979, copy appended in Appendix A hereto,

denying petitioner permission to appeal herein from said Appellate Division order of affirmance, constitute the base from which this petition for a writ of certiorari is drawn.

STATEMENT PURSUANT TO RULE 23 (f) OF THE SUPREME COURT RULES

In this case where tenure at FIT is statutorily constructed and defined, its substantive attributes prescribed in painstaking detail, and the implementing procedures for its protection so unambiguously mandated by that same definitive, comprehensive statute, it seems perfectly obvious to us that petitioner's litigating path for the vindication of her vocational rights—the one prescribed by statute and taken by petitioner—was the only valid one open to her; that initiating litigation either in the district court under 42 U.S.C. §1983 or the State Supreme Court in direct invocation of Education Law §2587 would either be premature or fatal to her claims without ever touching upon the backup protection of her Fourteenth Amendment federal due process rights. For Education Law §2587 (9), notwithstanding the Commissioner's professed helplessness to review FIT's actions, plainly reads:

> "9. Persons granted tenure under the provisions of this section shall not be removed except for cause, after a hearing and by a majority vote of the board. * * * the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter. * * *"

And it seems nothing less than sheerest casuistry to urge, as respondents have, that enforcement of the statute can be avoided by the simple expedient of terminating tenured teachers without the requisite hearing.

Given the premise of a State statute prescribing State remedies in which federal due process guarantees could be invoked remedially only for fundamental violations of the statute's requirements, it is not surprising that the main thrust of the proceedings—administrative before the Commissioner, judicial in Special Term and on appeal—was directed towards the correct interpretation of the statute and its application to the facts at hand.

Nevertheless, the peripheral significance of constitutional guarantees was asserted at the very outset in the petition instituting the administrative appeal to the Commissioner:

> "16. The pattern of illegal discrimination against me by F.I.T. violative of section 2587 of the Education Law, of the federal Civil Rights Law of 1964, of decisional rulings and later enactments, and of strong, constitutionally grounded, public policy is unmistakeably established in the secret dropping of me from further employment at F.I.T. after January 1968. * * *"

and the aforesaid petition to the Commissioner was, of course, submitted to Special Term as part of the return in that proceeding for judicial review.

With the Special Term judgment of dismissal on the merits—the denial of *both* administrative and direct judicial powers of enforcement of Education Law §2587, more specific attention was given to the federal constitutional aspects in the appeal to the Appellate Division. Most succinctly, it was thus pressed at pages 2 and 3 of petitioner's reply brief to the Appellate Division:

> "It seems nothing less than obtuse for the Commissioner to misinterpret FIT's January 1968 termination action, flagrantly violative of every line of Education Law, sec. 2587 (8) and of subsection (9) as well, of Zangrillo's human rights under every Human Rights law, and of her pro-

cedural due process rights under the Fourteenth Amendment of the United States Constitution, *Board of Regents v. Roth,* 408 U.S. 564 (1972). * * *"

And in the successive applications, first to the Appellate Division, then to the Court of Appeals direct, for permission to appeal to the Court of Appeals of the State of New York, the motion papers stated the following:

> "10. And even if the Commissioner is shut off by the strictures of *Bowen* from even inquiring whether Zangrillo had tenure of which she could be, wrongfully and in violation of the statute, deprived, we feel the Court of Appeals ought to be given the opportunity to consider whether, as a matter of strong public policy, that is really so, since Mr. Justice Stewart, speaking for his Court in the following respect, said in *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972):
>
> > '* * * Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by 'due process' also applied to a teacher recently hired without tenure or formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208.' "

Thus the federal constitutional objection to what had been done below was urged to the New York Court of Appeals. True, under Civil Practice Law and Rules §5601 (b)(1) and (2), an appeal might have been taken to that Court as of right on the ground that either a federal constitutional question of construction was "directly involved"—which we believe to be the case—or the instance—clearly inapplicable here—where the sole issue would be the constitutional validity of a statutory provision. If, speaking practically, the Court of Appeals felt

there was no constitutional question directly involved, dismissal of the appeal would follow with exactly the same effect as a denial of permission to appeal. On the other hand, moving successively for permission to appeal pursuant to Civil Practice Law and Rules §5602 (a)(1)(i) kept open both the statutory issue of the propriety of the interpretation, application, and enforcement of Education Law §2587 *and* the constitutional due process issues raised by petitioner. Clearly the statutory issue, if heard on appeal by the Court of Appeals, could have been resolved in such a way as to leave no claim of constitutional transgression. And if the Court of Appeals felt that the existence of a substantial question of federal constitutionality did indeed figure in the case, then it would have allowed the appeal to proceed as of right under §5520(b) of the Civil Practice Law and Rules. Proceeding by motion for permission to appeal was therefore the more conservative procedure for preserving the maximum spectrum of appeal opportunity. Indeed, under the Rules of the Court of Appeals, on such a motion for permission, the record and briefs below are submitted with the motion papers. Hence the decision of the Court of Appeals denying permission to appeal from the Appellate Division order of affirmance makes it abundantly plain that this petition seeks review from the final judgment rendered by the highest court of the State in which a decision could be had.

ARGUMENT FOR ALLOWANCE OF THE WRIT

i. In this petition invoking the Fourteenth Amendment of the United States Constitution, petitioner claims a deprivation of her due process property rights to her position as a statutorily tenured teacher at the Fashion Institute of Technology, 1) on January 31, 1965 when, without the requisite hearing or charges, she was summarily terminated and severed from the faculty, and 2) follow-

ing shortly upon the discovery that her termination had been made for the statutorily prohibited purpose of making way for the advancement of untenured personnel, she was wrongfully denied any merit adjudication of her claims notwithstanding that the litigating procedures taken were those prescribed by the tenure statute.

Patently the New York Education Law §2587 spells out a "property" interest in tenure at that school which is unusually comprehensive and detailed, and which, unlike the "liberty" interest claimed for the terminated medical school student in *Board of Curators, University of Missouri v. Horowitz,* 435 US 78, 82 (1978), is squarely within the ambit of constitutional protection, per Rehnquist, J.:

> "To be entitled to the procedural protections of the Fourteenth Amendment, respondent must in a case such as this demonstrate that her dismissal from the school deprived her of either a 'liberty' or a 'property' interest. Respondent has never alleged that she was deprived of a property interest. Because property interests are creatures of state law, Perry v. Sinderman, 408 US 593, 599-603, respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law. * * *"

We are, of course, mindful of *Bishop v. Wood,* 426 US 341, 349, 350 (1976) and its caveat against an inundation of the federal courts with discharge and termination cases claiming violation of federal due process constitutional rights through mere error in the administration of state law. More than the fact that this is a substantial "property" case rather than the considerably amorphous "liberty" case presented by *Bishop v. Wood,* this petitioner's case, we feel, presents such a clearcut showing of gross violation of due process vocational *and* litigating rights as, for a practical matter, to cast dsoubt on the *de*

facto enforceability of the federal vocational constitutional guarantees were it to go back unreviewed to the educational establishment.

Thus petitioner was tenured before she went out on maternity leave effective February 1st, 1963, witness her tenure certificate, copy appended as Appendix D to the petition.

In the words of the arbitrator:*

> "In or about 1967, Mrs. Zangrilio was ready to come back to work full-time, and she so notified the Employer.
>
> "Professor Kopp, the Department Chairman told grievant that she would give her the first available full-time opening, and asked her whether she would, in the meantime, agree to teach a three-hour course once a week.
>
> "Mrs. Zangrillo agreed, and by letter of August 29, 1967 was assigned as Adjunct Assistant Professor in the Apparel Design Department for the Fall semester effective as of September 1967. * * *"

On the certification of the college president to the board of trustees, petitioner was assigned to and taught a part-time program during the September 1967 through January 1968 semester. "At the end of that semester she was dropped, January 31, 1968." (Appendix C)

Again from the arbitrator:

> "When Professor Zangrillo's part-time assignment * * * came to an end in January 1968, she still sought full-

---

* As a matter of State law, grievance arbitration may not override the policy mandate of a statute, least of all a tenure statute.

Union Free School Dist. No. 2 of Cheektowaga v. Nyquist, 38 NY2d 137 (1975)

Binghamton Civil Service Forum v. City of Binghamton, 44 NY2d 23 (1978).

time employment at F.I.T., but without success.

"In the Spring of 1972, having been passed by for reemployment while others were hired, Mrs. Zangrillo retained counsel to assist in pressing her claim for reemployment.

"Some faculty members opposed the grievant's reemployment * * *. The Employer itself took the position that since grievant 'never returned from maternity leave [sic!] . . . the college has no obligation to' her * * *."

In that latter notion, as well as in the sentiment, "Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home" (Appendix C), in the college memorandum discovered to the petitioner in the course of the arbitration, the college authorities were dead wrong. For it had been determined by Commissioner Allen in *Matter of the Appeal of Lelia H. Johnson,* 3 Ed. Dept. Rep. 186 (June 4, 1964; copy appended as Appendix E to this petition) that prolonged absence of a tenured teacher could not be deemed a constructive resignation:

"The characterization of absence as a resignation is contrary to law and to fact. There is no evidence that appellant ever intended to resign. As a teacher on tenure appellant may be removed without her consent only on charges and after a hearing under the provisions of section 3013 of the Education Law.

"Since appellant has not resigned and has not been removed pursuant to section 3013, she is still in the employ of the district * * *."

In New York law a waiver of tenure rights must be freely, knowingly and openly made; it may never be implied, presumed, or constructive.

Matter of Baer v. Nyquist, 34 NY2d 291 (1974)

Clearly to use petitioner's maternity absence as a lever to pry her loose from her tenured position and to turn her career into a shambles *after* her return to faculty in September 1967, was as much a violation of her federal constitutional due process vocational rights as it was morally reprehensible.

Nor can the inability of any State forum, administrative or judicial, to afford petitioner a hearing and an adjudication on the merits of her substantial claim be written off as mere error, or perhaps no error at all. Not to have given the petitioner a forum to hear the merits of her case; indeed, to have denied a forum to her, was, by established constitutional standards, an independent viclation of petitioner's Fourteenth Amendment due process rights.

ii. Should this Court grant the writ, it would have before it a complete record of the case that was submitted to both the Commissioner and Special Term for disposition of the case on the merits. While the Justice sitting at Special Term felt that the Commissioner's mere considered view of statutes urged upon him as dispositive was enough to relieve his disregard of them from being held arbitrary and capricious by the reviewing authority, e.g.,

"The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction under those sections may not be said to be arbitrary and capricious." (Appendix B, pp. 9a, 10a)*,

* The Special Term decision made the factual error of asserting that petitioner had appealed to the Commissioner to "restore her to a full-time tenured teaching position." She had been reinstated for the second time in February 1973 with a continuation of tenure, and was seeking, both before the Commissioner and here, a make whole remedy for the consequences in rank, pay and back pay of her wrongful termination of January 31, 1968.

the Commissioner must make his determinations in conformity with the requirements of governing law. Thus in *Board of Education v. Nyquist,* 37 AD2d 642 (1971), affirmed 31 NY2d 468 (1973), the Appellate Division said,

> "And where the Commissioner makes an erroneous determination on a question of law, his decision is, in a legal sense, purely arbitrary.***"

Patently, and by the same token, a Commissioner's decision must meet constitutional requirements.

We feel that *Franks v. Bowman Transportation Co., Inc.*, 424 US 747 (1976) should be the governing authority for the fashioning of a make-whole remedy on remand.

Following the exhaustion of State litigating forums through the highest appellate Court of the State, there is, of course, no doubt whatsoever as to the jurisdiction and power of this Court to sit in review of the federal constitutionality of the acts of the respondents and of the determinations, both administrative and judicial, of the State tribunals. Matched against the aptness of this petitioned forum is the grim fact that the realities of the sheer physical limitations of this Court's ability to handle a caseload force the turning away of the considerable majority of the matters offered regardless of the merits they may possess. Yet the dangers to petitioner's aspirations in invoking the district court under 42 U.S.C. §1893 after so complete a course of State court appellate review makes the bringing of this petition utterly necessary if the constitutional guarantees of her valuable property rights—and constitutional rights, not statutory rights, are all she has left—are to be applied in her behalf. We feel that the importance of individual constitutional rights as against the exercise of government power has always been recognized and acted

upon by this Court, and that, aside from the obvious personal importance of the case to petitioner, the matter has a potentially important jurisprudential impact in building the case law of Fourteenth Amendment due process guarantees with respect to personal property rights.

CONCLUSION

For the foregoing reasons, we earnestly pray that this petition for a writ of certiorari be granted.

Dated: March 13, 1980.

Respectfully submitted,

MILTON HOROWITZ
Counsel for Petitioner
15 Park Row
New York, New York 10038
(212) COrtlandt 7-0606

APPENDIX A
Determinations Sought to Be Reviewed
Decision of New York Court of Appeals Denying
Permission to Appeal, December 17, 1979

Mo. No. 1140

In the Matter of the Application of Frances Leto Zangrillo,
Appellant,

For a Judgment &c.

vs.

Gordon M. Ambach, as Commissioner of Education of the State of New York, et al.,
Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS DEC. 17, 1979

* * * * * * * * *

Order of Affirmance of Appellate Division, Third Department, June 4, 1979

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of March, 1979

PRESENT:

HON. A. FRANKLIN MAHONEY, *Presiding Justice,*

HON. LOUIS M. GREENBLOTT; HON. T. PAUL KANE; HON. ROBERT G. MAIN; HON. ANN T. MIKOLL,

Associate Justices

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Appellant,

For a Judgment under Article 78, CPLR,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Frances Leto Zangrillo having appealed from a judgment of the Supreme Court of Albany County, entered on the 10th day of March, 1979, in the office of the clerk of the County of

Albany and said appeal having been presented during the above-stated term of this Court, and having been orally argued by Milton Horowitz, Esq., of counsel for appellant, and by Robert Stone, Esq. (Carol M. Hoffman, Esq., of counsel) of counsel for respondent Gordon M. Ambach as Commissioner of Education of the State of New York, and Marc L. Silverman, Esq., of counsel for respondent Fashion Institute of Technology, and, after due deliberation, the Court having rendered a decision on the 17th day of May, 1979, it is hereby

ORDERED that the judgment so appealed from be affirmed, with costs.

ENTER:

[s] John J. O'Brien, Clerk

DATED AND ENTERED JUNE 4, 1979.

Final Judgment of Supreme Court, Albany County, March 8, 1978

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse in the City of Albany, on the 10th day of February, 1978.

PRESENT:
HON. JOHN T. CASEY, *Justice.*

JUDGMENT—Index No. 667/1978

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

Petitioner, FRANCES LETO ZANGRILLO, by her attorney, Milton Horowitz, Esq., having commenced a special proceeding for judgment pursuant to section 7806 of the Civil Practice Law and Rules vacating, annulling and setting aside an administrative determination duly made by GORDON M. AMBACH, as Commissioner of Education of the State of New York, pursuant to the provisions of section 310 of the Education Law dismissing the appeal of FRANCES LETO

ZANGRILLO, the petitioner herein, and said proceeding having regularly come on to be heard before the Hon. John T. Casey at a Special Term, Part I of this Court held at the County Courthouse thereof, located in the City of Albany on the 10th day of February, 1978, and petitioner having duly appeared by Milton Horowitz, Esq., and respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York, having duly appeared by Robert D. Stone, Esq. (James H. Whitney, Esq., of counsel) and respondents President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY having duly appeared by Phillips, Nizer, Benjamin, Krim and Ballon, Esqs. (Marc L. Silverman, Esq., of counsel) and the issues in the above-entitled proceeding having been duly argued at the call of the calendar.

Now, upon reading and filing of the notice of petition dated the 29th day of December, 1977 and the petition duly verified on the 29th day of December, 1977, together with the exhibits annexed thereto, and the supplementary affidavit for the petition sworn to by Milton Horowitz, Esq. on the 9th day of February, 1978, all in support of petitioner's application for judgment in accordance with her prayer for relief and upon the answer submitted on behalf of respondent AMBACH duly verified on the 25th day of January, 1978 and the answer submitted on behalf of respondents President and Board of Trustees of THE FASHION INSITUTE OF TECHNOLOGY, duly verified on the 3rd day of February, 1978, and upon all the proceedings heretofore had herein; and due deliberation having been given; and a decision of this Court having been made thereon on March 3, 1978 by the Hon. John T. Casey in favor of respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY and against petitioner FRANCES LETO ZANGRILLO, dismissing the petition and directing the entry of judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of respondent GORDON M. AMBACH, as Commissioner of Education of the State of New York and respondents President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY, dismissing on the merits the petition to review heretofore served herein and the same is hereby dismissed without costs.

ENTER

[s] John T. Casey
Justice of the Supreme Court

Dated: Troy, New York
March 8, 1978

Entered March 10, 1978.

APPENDIX B

Decision of Appellate Division, Third Department, Unanimously Affirming Final Judgment, Without Opinion, May 17, 1979

May 17, 1979 70 AD2d 790, 416 N.Y. Supp. 2d 159 34286

In the Matter of FRANCES LETO ZANGRILLO,
Appellant,

v.

GORDON M. AMBACH, as Commissioner of Education of the State of New York, et al.,
Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Casey, J.), entered March 10, 1978 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, seeking to set aside a determination of the Commissioner of Education that he lacked jurisdiction to review a controversy between petitioner and respondent Fashion Institute of Technology.

Judgment affirmed, with costs. No opinion.

MAHONEY, P.J., GREENBLOTT, KANE, MAIN and MIKOLL, JJ., concur.

Special Term, Albany County
Supreme Court Decision, March 3, 1978

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of THE FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

(Supreme Court, Special Term, Albany County, February 10, 1978) (Justice John T. Casey, Presiding)

APPEARANCES: MILTON HOROWITZ, ESQ., Attorney for Petitioner, 15 Park Row, New York, New York 10038

ROBERT D. STONE, ESQ., Attorney for Respondent Commissioner of Education of the State of New York, State Education Building, Albany, New York 12234

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS., Attorneys for Respondent Fashion Institute of Technology, 40 West 57th Street, New York, New York 10019

MEMORANDUM

CASEY, J.

The petitioner has instituted an Article 78 Proceeding wherein she seeks a judgment setting aside a determination of the Commissioner of Education of the State of New York.

In 1977 pursuant to Section 310 of the Education Law the petitioner commenced an appeal before the Commissioner of Education wherein she claimed that one of the respondents, The Fashion Institute of Technology, violated the provisions of Section 2587 of the Education Law. In that appeal the petitioner sought an order directing The Fashion Institute of Technology to, among other things, restore her to a full-time tenured teaching position.

The Commissioner determined that the Fashion Institute of Technology was not a part of the common school system but was a community college. The Commissioner noted that Section 310 of the Education Law granted him jurisdiction to hear controversies concerning schools within the common school system, Consequently, the petition was dismissed upon the ground that the Commissioner lacked subject matter jurisdiction.

The jurisdiction of the Commissioner of Education under Section 310 of the Education Law is limited to matters within the common school system. Education Law, §310 (7); *Matter of Bowen v. Allen,* 17 App.Div. 12, aff'd without opinion 13 N.Y.2d 665. Nothing in the papers presented indicate that the Commissioner was arbitrary or capricious in determining that The Fashion Institute of Technology was not within that system. Accordingly, the Commissioner's decision with regard to his lack of jurisdiction under Section 310 may not be set aside.

The petitioner argues that even if jurisdiction under Section 310 is absent, the Commissioner has jurisdiction under Section 308 or Section 2587 (9) of the Education Law. Suffice it to say that the arguments were advanced before the Commissioner, and upon the facts presented his failure to exercise jurisdiction

under those sections may not be said to be arbitrary and capricious.

The petition is dismissed. Submit judgment.

Dated: Troy, New York
March 3, 1978.

Commissioner's Decision No. 9511, September 28, 1977
New York Education Department Reports
17 Ed. Dept. Rep. 98

In the Matter of the appeal of FRANCES LETO ZANGRILLO from action of the President and Board of Trustees of Fashion Institute of Technology with regard to salary.*

Decision No. 9511

(September 28, 1977)

Milton Horowitz, Esq., attorney for petitioner

Phillips, Nizer, Benjamin, Krim and Ballon, Esqs., attorneys for respondents, Marc L. Silverman, Esq., of counsel

AMBACH, Commissioner.—This appeal concerns the appropriate placement of petitioner on the salary schedule for assistant professors employed by the Fashion Institute of Technology.

Respondents contend that this appeal may not be brought to the Commissioner of Education pursuant to the provisions of Education Law §310. The jurisdictional basis for this appeal, if any, must be found in that portion of §310 which provides:

> Such appeal or petition may be made in consequence of any action:
>
> * * *

> By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

This provision was construed by the Appellate Division in *Matter of Bowen et al. v. Allen* (17 AD2d 12, 14, 230 NYS2d 578, aff'd without op 13 NY2d 663, 240 NYS2d 991 (1963) as follows:

> Although the clause "concerning any other matter under this chapter" could literally, and if it stood alone, embrace much more than the common school classifications of the first six subdivisions, the words "concerning any other matter under this chapter" do not stand alone, and words are circumscribed and modified by the contextual words which precede and follow them.

The court concluded that the Commissioner of Education correctly determined that he lacked jurisdiction to hear an appeal involving the dismissal of professional employees of the State University College of Long Island.

The initial question presented by this appeal is whether the Fashion Institute of Technology is a part of the common school system. On April 21, 1944, the Educational Foundation of the Apparel Industry received an absolute charter from the Board of Regents for the purpose of assisting the New York City Board of Education in planning, establishing and maintaining a fashion institute of technology and design. In accordance with the provisions of Education Law §6302(2), the Board of Trustees of the State University of New York approved the New York City Board of Education as the local sponsor of a community college, to be known as the Fashion Institute of Technology. This institution receives financial support from the local sponsor and the Educational Foundation for the Fashion Industries, which is the amended corporate name of the former Educational Foundation for the Apparel Industry. Fashion Institute of Technology is governed by its own board of trustees,

in accordance with the provisions of Education Law §6306(1) and (3).

Chapter 332 of the Laws of 1975 transferred jurisdiction and control of eight community colleges in the City of New York from the State University of New York to the City University of New York, which is a part of the common school system pursuant to Education Law §6202(1). However, the jurisdiction and control of Fashion Institute of Technology by its own board of trustees, subject to supervision by the Board of Trustees of the State University, was not altered by Chapter 332.

In view of the foregoing, I conclude that Fashion Institute of Technology is a community college, the actions of which are not subject to review by the Commissioner pursuant to Education Law §310 (*Matter of Roode,* 9 Ed Dept Rep.65 (1969). Consequently, this appeal msut be dismissed.

THE APPEAL IS DISMISSED.

**Zangrillo v. Ambach et al.;* Supreme Court, Albany County, Special Term; Casey, J., judgment granted dismissing petition to review; 3/3/78; n.o.r.

APPENDIX C

Memorandum to College President, June 22, 1972

FASHION INSTITUTE OF TECHNOLOGY

227 West 27th Street, New York, N.Y.

June 22, 1972

TO: President Feldman

Mrs. Zangrillo's separation from the college commenced February 1, 1963 through a maternity leave until January 31, 1964. She asked for and received an extension for one year — 21/64 — 1/31/65.

August, 1967 — more than 2-1/2 years after expiration of the extension, she taught 1-1/2 courses, total 3 hours per week, on a Part-Time basis in the Fall 1967 semester, as an Adjunct Asst. Prof. At the end of that semester, she was dropped, January 31, 1968.

The By-Laws in effect stated:

> "Faculty Members who resign shall be eligible for re-instatement in the same rank within 10 years, and re-employment by the President within his discretion."

Therefore, in its most favorable light:

1. If re-instatement were considered — the rank which she held upon resignation if it was 1968.
2. In using Presidential discretion in consideration of re-instating her, he has to get advice from educational advisors of the department.

(Above information from Mr. Gershon)

The chairman at that time was Prof. Erna Kopp, who retired in 1969. When contacted on June 21, 1972, Prof. Emeritus Kopp stated:

Mrs. Zangrillo came in to fill the need for an instructor for a 3 hour class for that one semester. After that semester, there were no classes available, for it was felt that Mrs. Zangrillo had given up all her rights, including seniority, upon expiration of the extension of maternity leave. Any department courses which were available, were being given to Part-Time people who had been there longer and had continued to teach, up to that period of time. In addition, Prof. Kopp said that Mrs. Zangrillo had been out of industry so long, and the Fashion Industry is one in which current experience *and* contact is very important for the students.

The Assistant Chairman was Prof. Vittorina Rolfo, who retired in 1969. When contacted on June 19, 1972, Prof. Emeritus Rolfo stated:

Mrs. Zangrillo taught that one course and since her maternity leave had expired, much time had passed, and Mrs. Zangrillo had given up her rights and seniority voluntarily to stay home. The other Part-Time members of the department were felt to have seniority if any full-time openings became available, and for any course offerings. In addition, several evening instructors had been offered daytime teaching opportunities as they became available, and were being trained to come in, especially those who were still in industry in the daytime while teaching at night.

Prof. Kopp also mentioned that Dean Snyder, who was Dean of Faculty at that time, 1963-1965, handled maternity leave applications.

Mrs. Zangrillo has been teaching at Maxwell Vocational High School on a substitute basis recently.

Attached is a copy of Mrs. Zangrilo's background.

(Prof.) Hilda Friedman
Chairman, Fashion Design Department

APPENDIX D

Tenure Certificate, May 15, 1962

FASHION INSTITUTE OF TECHNOLOGY May 15, 1962

CERTIFICATE
OF
PERMANENT TENURE

Mrs. Frances Zangrillo
461 Autumn Avenue
Brooklyn 8, N.Y.

Dear Mrs. Zangrillo:

This is to CERTIFY that the Board of Trustees, at its meeting held on May 14, 1962, has determined that you have satisfied the requirements of the Education Law and the regulations of the College for entitlement to tenure in the following rank and subject field:—

Tenure Rank: Instructor
Subject Field: Apparel Design

Your date or ogiginal appointment to a position eligible for tenure: September 1, 1959.

You are now a member of *the permanent instructional staff* of the College.

This *CERTIFICATE OF PERMANENT TENURE* is being issued to you in accordance with Section 2587, subdivision 5, of the Education Law which is the F.I.T. Tenure Law.

You have our congratulations and very best wishes.

BOARD OF TRUSTEES OF THE
FASHION INSTITUTE OF TECHNOLOGY

[S E A L]

By [s] MORRIS W. HAFT
Chairman of the Board

[s] LAWRENCE L. BETHEL
President

ATTEST:
[s] SHIRLEY GOODMAN
Secretary

APPENDIX E

New York State Education Department Report,
Matter of Lelia H. Johnson, June 4, 1964
Decision No. 7356
3 Ed. Dept. Rep. 186

In the Matter of the Appeal of Lelia H. Johnson from Action of Board of Education, Central School District No. 1, Towns of Penfield, Perinton and Brighton, Monroe County, and Walworth and Macedon, Wayne County, Determining That Appellant Had Resigned Her Position as Teacher and Denying Tenure Rights.

Decision No. 7356

(June 4, 1964)

TEACHER (tenure) (resignation)—EDUCATION LAW, §3013 Respondent attempted to constitute appellant's gross absence from teaching duties as resignation—not legally proper—no evidence appellant intended to resign—may be removed only on charges and after hearing—appeal sustained.

Antell, Potter and Harris, Esqs., attorneys for appellant
Breman, Centner and Palermo, Esqs., attorneys for respondent
John E. Glenn, Esq., attorney for New York State Teachers Association, *amicus curiae*

ALLEN, JR., Commissioner.—Appellant is a teacher on tenure employed by respondent, who, due to illness taught only a few days in the four school years from 1959-60 through 1962-63. On September 24, 1963 respondent Board adopted a resolution reading, in part:

> "That the performance of regular teaching duties by a teacher for only 27 days in four years and only 3 days in the past three years, without a leave of absence granted by the Board of Education, whether for reasons of health or

otherwise, constitutes a resignation in fact from the position of teacher in this school system."

Respondent refused to assign a class to appellant and permit her to return to active teaching duty in September, 1963 although she asserted she was willing and able to do so and although she submitted a letter from her physician stating she was physically able.

The characterization of absence as a resignation is contrary to law and to fact. Resignation must be a voluntary and deliberate act. There is no evidence that appellant ever intended to resign. As a teacher on tenure appellant may be removed without her consent only on charges and after a hearing under the provisions of section 3013 of the Education Law.

Since appellant has not resigned and has not been removed pursuant to section 3013, she is still in the employ of the district and the fact that the respondent did not assign her to a class does not defeat her right to such pay as she may have earned (*Matter of Boyd v. Collins,* 11 N.Y. 2d, 228).

The appeal is sustained.

IT IS ORDERED that the Board resolution of September 24, 1963 relating to appellant's purported resignation be and the same hereby is set aside; and it is further

ORDERED that the respondent correct its records to indicate that appellant has continued to be and is still employed as a teacher on tenure; and it is further

ORDERED that respondent pay appellant's salary from the opening of school in September 1963 until appellant's employment is terminated in accordance with law, less any amounts appellant may have earned from other employment during such period.

Supreme Court, U. S.
FILED
APR 14 1980
ROBERT L. STOCK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1444

FRANCES LETO ZANGRILLO,
Petitioner,

against

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JEAN M. COON
Deputy Counsel
State Education Department
State Education Building
Albany, New York 12234
Attorney for Respondent Gordon M. Ambach

ROBERT D. STONE
Counsel and Deputy Commissioner for Legal Affairs
State Education Department
State Education Building
Albany, New York 12234

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
PHONE: (716) 344-2060

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1444

FRANCES LETO ZANGRILLO,
Petitioner,

against

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent Gordon M. Ambach, as Commissioner of Education of the State of New York, respectfully prays that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

Opinions and Orders Below

The decision of the New York State Court of Appeals denying petitioner's motion for leave to appeal is reported at 48 NY 2d 611. The order of the Court of Appeals is annexed hereto as Appendix A.

Jurisdiction

The asserted basis of jurisdiction is 28 U.S. Code, Section 1257(3), based upon an alleged violation of petitioner's substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution.

Questions Presented for Review

1. Was the New York Court of Appeals correct when it held, in effect, that petitioner's appeal did not present any issue of an alleged deprivation of a constitutional or statutory right of petitioner?

2. Was the New York Court of Appeals correct when it held, in effect, that petitioner had selected the inappropriate forum in which to litigate her claim against the Fashion Institute of Technology?

Constitutional Provisions and Statutes Involved

Amendment XIV, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

28 U.S. Code, Section 1257(3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

McKinney's Consolidated Laws of New York, Book 16 Education Law

§ 310. Appeals or petitions to commissioner of education and other proceedings

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

6-a. By a principal, teacher, owner or other person in charge of any school in denying a child admission to, or continued attendance at, such school for lack of proof of required immunizations in accordance with section twenty-one hundred sixty-four of the public health law.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

Note: Subdivision 6-a added in 1979.

Statement of the Case

Petitioner is a faculty member of the Fashion Institute of Technology, which is a community college within the State University of New York. She was granted a maternity leave from February 1, 1963, which was extended until January 31, 1965. Upon her failure to return from maternity leave, petitioner was deemed to have submitted her resignation. The bylaws of the institution, which had provided for an unqualified right of reinstatement within ten years after the resignation of a faculty member, were amended prior to petitioner's maternity leave to provide that faculty members who resign shall be eligible for reinstatement in the same rank within ten years, and re-employment by the President within his discretion.

Petitioner returned to full-time teaching as an assistant professor at the institution in February of 1973. Thereafter, she commenced a grievance pursuant to the contract between the Fashion Institute of Technology and the teacher's collective bargaining unit, in which she alleged that she had been placed on the inappropriate step of the salary schedule for assistant professor upon her re-employment. Following the denial of the grievance at three different levels, petitioner commenced an appeal to the Commissioner of Education of the State of New York.

The Commissioner ruled that he did not have jurisdiction to determine petitioner's appeal because the statute authorizing him to determine appeals limits his jurisdiction to matters pertaining to the common school system of the State of New York and the Fashion Institute of Technology is not a part of the common school system of the State of New York.

Petitioner thereafter instituted a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules for judicial review of the Commissioner's decision. By decision dated March 3, 1978, Mr. Justice John T. Casey of the New York State Supreme Court, Special Term, County of Albany, affirmed the determination of the Commissioner, and directed the entry of judgment dismissing the petition to review. Mr. Justice Casey held that upon the record before him there was no indication that the Commissioner had been arbitrary or capricious in determining that the Fashion Institute of Technology was not within the common school system of the State of New York, and that accordingly, the Commissioner's decision with regard to his lack of jurisdiction to entertain the appeal pursuant to section 310 of the Education Law could not be set aside. Judgment was entered dismissing the petition on March 10, 1978.

Petitioner then appealed to the Appellate Division of New York State Supreme Court, Third Judicial Department. The Appellate Division unanimously affirmed the judgment of the Supreme Court at Special Term, without opinion, and with costs to the respondents. The order of affirmance of the Appellate Division was entered on June 4, 1979.

Petitioner moved for leave to appeal to the New York Court of Appeals pursuant to section 5602 of the Civil Practice Law and Rules. On December 17, 1979, the Court of Appeals denied the motion for leave to appeal with costs to respondents. The order of the Court of Appeals was entered on December 17, 1979.

ARGUMENT

POINT I

The judgment sought to be reviewed has an adequate basis in State law.

The judgment which petitioner seeks to have this Court review was based upon an interpretation of New York Education Law section 310, which confers jurisdiction upon the State Commissioner of Education to hear and determine appeals from the actions of certain public school officials.

The extent to which the Commissioner is authorized to adjudicate the rights of individuals who believe themselves to be aggrieved by the action of local school authorities is clearly a matter of State law, the decision of which by the highest court of the State must be accepted as controlling by this Court (*Grubb v. Public Utilities Commission*, 281 US 470 [1930]). The Commissioner's determination that he lacked jurisdiction to consider the merits of the appeal brought to him by petitioner necessarily involved the construction of a State statute, which has been upheld by the court of original jurisdiction and two appellate courts. It is not the function of this Court upon review of a decision of a State's highest court to construe a State statute contrary to the construction given it by the State's highest court (*Landmark Communications Inc. v. Virginia*, 435 US 829 [1978]; *Memorial Hospital v. Maricopa County*, 415 US 250 [1974]; *O'Brien v. Skinner*, 414 US 524 [1974]).

If, for the sake of argument, it is assumed that petitioner properly raised a Federal question in the courts below, it is nevertheless manifest that the judgment of

the New York Court of Appeals has an adequate and independent basis in State law. Consequently, this Court has no jurisdiction to consider the alleged Federal question which petitioner attempts to raise (*Fox Film Corp. v. Miller*, 296 US 207 [1935]; *Cramp v. Board of Public Instruction*, 368 US 278 [1961]; *Jankovich v. Indiana Toll Road Commission*, 379 US 487 [1965]; *Fay v. Noia*, 372 US 391 [1963]).

In essence, the judgment sought to be reviewed is based upon the legal premise that petitioner selected the wrong forum in which to pursue her alleged grievance against her employer. The judgment is not based upon a State court decision which was rendered to evade a constitutional issue (*Wolfe v. North Carolina*, 364 US 177 [1960]). It has been repeatedly held by this Court that a wrong choice of forum or remedy is an adequate State ground for a judgment which precludes review of a Federal question (*McQuade v. Trenton*, 172 US 636 [1899]; *Farson, Son and Co. v. Bird*, 248 US 268 [1919] *McCoy v. Shaw*, 277 US 302 [1928]; *Herb v. Pitcairn*, 324 US 117 [1945], Supp.-Op. 325 US 77 reh. den. 325 US 893; *Copperweld Steel Co. v. Industrial Comm.*, 324 US 780 [1945]; *Parker v. Illinois*, 333 US 571 [1948] reh. den. 334 US 813; *Edelman v. California*, 344 US 357 [1953]).

Petitioner's contention that she was obliged to bring an appeal to the Commissioner before pursuing her alleged Federal claim in either State Supreme Court or United States District Court is without merit. Her reliance upon the provisions of Section 2587, subd. 9 of the New York State Education Law is misplaced. That subdivision does provide for an appeal to the Commissioner by a person who has been granted tenure by the

Fashion Institute of Technology, when charges have been brought against such person and the Board of Trustees of Fashion Institute of Technology has fixed a penalty. The relevant portion of subdivision 9 of section 2587 reads as follows:

> "The board may reject, confirm or modify the conclusions of the trial committee, and the decisions of the board shall be final, except that any person aggrieved may review the determination of said board only by an appeal to the commissioner of education, as provided for by article seven of this chapter."

It is readily apparent that this provision for review by the Commissioner of a determination by the Board of Trustees of Fashion Institute of Technology concerning the punishment of a tenured teacher affords no basis for a conclusion that the Commissioner has jurisdiction to entertain the appeal of a teacher concerning the alleged failure of such board to appoint her to a full-time position upon her request for reinstatement. Petitioner has not been dismissed or disciplined by respondent board of trustees in accordance with the provisions of subdivision 9 of section 2587 of the Education Law.

Therefore, it is clear that petitioner was not compelled to select an appeal to the Commissioner to litigate her alleged Federal question claim against the Fashion Institute of Technology. She could have pursued the matter in either State Supreme Court or in United States District Court. Instead, she selected an appeal to the Commissioner to review the action of the governing body of an entity which is part of the State University of New York despite the well established decisional law holding that the Commissioner is not the appropriate forum for

the resolution of disputes pertaining to the State University of New York (*Matter of Bowen v. Allen*, 17 AD 2d 12, affd. w/o opinion, 13 NY 2d 663 [1963]; *Matter of Roode*, 9 Education Department Reports 65 [1967]). Clearly, petitioner had a reasonable opportunity to have the issue as to the claimed right heard and determined by a State Court (*Parker v. Illinois, supra*).

The State law basis for the judgment was not arbitrary or a mere device to prevent the review of a decision upon the Federal question. Accordingly, there is an adequate and independent basis in State law for the judgment of the New York Court of Appeals, and this Court should decline to review such judgment (*Fay v. Noia, supra*).

POINT II

The petition does not present a Federal question.

In order for petitioner to establish that this matter meets the jurisdictional requirements for this Court set forth in 28 USC 1257, it must be clear that either the validity of a treaty or statute of the United States is drawn in question, the validity of a State statute is drawn into question as being repugnant to the United States Constitution or the laws and treaties of the United States, or that a title, right, privilege or immunity is set up or claimed under the United States Constitution or treaties or statutes of the United States. There is no question of the validity of either a Federal or State statute raised in the decision of the New York Court of Appeals. The asserted ground for the relief requested is that petitioner has been denied a property right without due process of law in violation of the Fourteenth Amendment to the Constitution.

Petitioner's contention of a due process violation is premised upon her belief that her tenure rights were violated by the Fashion Institute of Technology when it declined to reinstate petitioner to a full-time position in 1967. However, at the time petitioner unsuccessfully attempted to return to the faculty of the Fashion Institute of Technology, she was not a tenured teacher. Consequently, there has been no deprivation of property without due process of law.

Petitioner's reliance upon the provisions of Education Law section 2587 is misplaced. The sole relevance of section 2587 to petitioner's claim against respondent board of trustees is petitioner's assertion that respondent allegedly violated her tenure rights when it concluded that petitioner had, in effect, resigned and given up her seniority rights, when she failed to return to employment upon the expiration of her maternity leave on or about February 1, 1965. However, the termination of the employment status of an individual who does not return from a leave does not involve a violation of tenure rights (*Matter of Thomas v. Board of Ed. Oceanside UFSD*, 58 AD 2d 584 [Second Dept., 1977]).

Petitioner's real grievance with respondent board of trustees was caused by a change in respondent's policy of reinstatement from one of unqualified eligibility for reinstatement in the same rank within 10 years, to a policy of reinstatement in the discretion of the president of the institution. The dispute over the effect of respondent's maternity leave and reinstatement policy has been resolved by respondent's agreement to reinstate petitioner as a tenured full-time assistant professor in February of 1973.

The ongoing dispute between petitioner and respondent board of trustees concerns the appropriate place-

ment of petitioner on respondent's salary scale, for which petitioner appealed to the Commissioner. Although petitioner continues to allege a violation of her tenure rights because of an alleged violation of the provisions of section 2587 of the Education Law, it is respectfully submitted that section 2587 is irrelevant to the dispute between petitioner and her employer, and that her cause of action is in reality premised upon the provisions of the contract between the Fashion Institute of Technology and the collective bargaining unit representing the teachers at such institution. The gist of petitioner's complaint is that she was not offered full-time employment at the appropriate level when she desired to be reinstated as a teacher at Fashion Institute of Technology. Such reinstatement is not dependent upon the provisions of section 2587, which does not authorize or require respondent board of trustees to reinstate a teacher who has resigned. Petitioner was reinstated within the discretion of the present of Fashion Institute of Technology in accordance with the bylaws and policies of the institution. Petitioner's right, if any, to challenge the action taken by the college president must be attributed to the grievance procedure in the contract between the college and its teachers, rather than to any provision of the Education Law.

Petitioner's arguments with regard to an alleged violation of her rights pursuant to subdivisions (8) and (9) of section 2587 of the Education Law simply ignore the fact that she failed to return from her extended maternity leave in 1965, and that such failure to return constituted a constructive resignation of her position with a loss of her tenure rights.

In the absence of any substantial Federal question, the petition for a writ of certiorari to the Court of Appeals of New York should be denied.

POINT III

Petitioner failed to assert on a timely basis any Federal question or claim.

Petitioner, who was a tenured employee of respondent Fashion Institute of Technology, left on maternity leave effective February 1, 1963 and continued to remain at home beyond the expiration of her maternity leave on January 31, 1965. She alleges that she was ready to return to full-time employment at Fashion Institute of Technology as of September of 1967. She returned on a part-time basis for one semester ending in January of 1968. Thereafter, she returned to full-time employment in February of 1973.

The appeal to the Commissioner was commenced on May 4, 1976, almost nine years after petitioner desired to return on a full-time basis but was not permitted to do so. The inordinate delay in seeking to vindicate her alleged tenure rights would prevent petitioner from successfully prosecuting her claim in any court of the State of New York.

The most appropriate method to review the refusal of the Fashion Institute of Technology to re-employ petitioner, particularly in view of petitioner's reliance upon the provisions of section 2587 of the Education Law, would have been by a special proceeding in State Supreme Court commenced pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. Proceedings of this nature must be started within four months after the determination to be reviewed becomes final (Civil Practice Law and Rules section 217). In the alternative, petitioner could have pursued her claim of

unlawful discrimination by administrative appeal to the State Division of Human Rights, provided such claim were made within one year after the alleged unlawful discrimination (Executive Law, § 297[5]), or in an action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, provided that an administrative appeal is not taken (Executive Law, § 297[7]). The latter provision of the Executive Law does not specify the time limitation for an action of this nature. However, the substance of the action, *i.e.* the relationship out of which the claim arises and the relief sought, is similar to that of a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Since there was some other form of judicial proceeding which was available, and for which there is a specific limitation period, the four month period within which to bring an Article 78 proceeding would apply to an action under Executive Law § 297(9) (*Solnick v. Whalen*, 49 NY 2d 224 [1980]). In the alternative, Civil Practice Law and Rules section 213(1) requires that an action must be commenced within six years if it is an action for which no limitation is specifically prescribed by law. Therefore, petitioner would be barred from litigating her claim by either time limitation.

Petitioner now claims reliance upon the provisions of 42 USC 1983 for the alleged violation of her civil rights. A cause of action based upon that statute could have been commenced in either the State Supreme Court, as the court of general original jurisdiction, or in the appropriate United States District Court (*Long v. District of Columbia*, 469 F. 2d 927 [D.C. Cir., 1972]; *Davis v. Towe*, 379 F. Supp. 536 [D.C. Va., 1974] affd. 526 F. 2d 588 [4th Cir., 1975]). The limitation upon the time to bring an action under 42 USC 1983 would be the same in

either the Federal or State forum because State law controls the limitations period for actions of this nature (*Wooten v. Sanders*, 572 F. 2d 500 [5th Cir., 1978]). The statute of limitations provided by the State for the analogous cause of action to that under § 1983 would be the appropriate period of limitation (*Eubanks v. Clarke*, 434 F. Supp. 1022 [D.C. Pa., 1977]). In this case, the analogous cause of action in New York would be that created by Executive Law section 297(9), which as discussed above would have a statute of limitations of four months (CPLR § 217), or of six years (CPLR § 213[1]).

From the foregoing, it is evident that petitioner waited far too long to assert her alleged cause of action involving a deprivation of civil rights or a taking of a property right without due process of law, in order to have a timely claim in any forum. Consequently, she may not attempt to raise a Federal question in this request for a writ of certiorari.

Conclusion

The judgment of the New York Court of Appeals has an adequate, independent basis in State law that petitioner selected the incorrect forum in which to litigate her claim against the Fashion Institute of Technology. The construction of the State statute conferring jurisdiction upon the Commissioner of Education to hear certain appeals is not a matter for this Court to review. In view of the fact that there is an adequate basis in State law for the judgment below, this Court does not have jurisdiction to consider the Federal question alleged by petitioner. The dispute between petitioner and the

Fashion Institute of Technology involves the placement of petitioner upon the appropriate level of the school's salary scale, which involves the interpretation of the contract between the school and its teachers. No substantial Federal question is presented. Any Federal question claim petitioner may have had was never litigated within the limitation for the time to commence an appropriate action or proceeding in the State of New York, and is therefore not properly before this Court.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 4, 1980.

Respectfully submitted,

JEAN M. COON,
Deputy Counsel,
State Education Department,
State Education Building,
Albany, New York 12234,
Attorney for Respondent Ambach.

Robert D. Stone,
Counsel and Deputy Commissioner
for Legal Affairs,
State Education Department,
State Education Building,
Albany, New York 12234,
Of Counsel.

APPENDIX A

**Order of the New York Court of Appeals,
Dated December 17, 1979**

STATE OF NEW YORK,

Court of Appeals

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At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of December A. D. 1979.

Present: HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

Mo. No. 1140
In the Matter of the
Application of Frances Leto Zangrillo,
Appellant,

For a Judgment &c.

vs.

Gordon M. Ambach, as Commissioner of
Education of the State of
New York, *et al.*,
Respondents.

Appendix A—Order of the New York Court of Appeals, Dated December 17, 1979.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court.

Supreme Court, U. S.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1444

FRANCES LETO ZANGRILLO,

Petitioner,

against

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARC L. SILVERMAN
Attorney for Respondent
President and Board of Trustees of
Fashion Institute of Technology
40 West 57th Street
New York, New York 10019
(212) 977-9700

MICHELLE S. GRUDER
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jurisdiction

The petitioner asserts as a basis for jurisdiction 28 U.S.C. Section 1257(3), based upon an alleged violation of petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

Questions Presented

This petition for certiorari from a determination of the New York Court of Appeals denying petitioner's motion for leave to appeal and holding, in effect, that respondents did not violate any constitutional or statutory right of petitioner presents the following questions:

1. Whether this Court should entertain this petition where the New York Court of Appeals rendered its decision against petitioner on an adequate and independent state ground under the New York Education Law?

2. Whether this Court should entertain this petition where petitioner failed to raise any federal question in the state court of original jurisdiction below.

Statement of the Case

Respondent Fashion Institute of Technology ("FIT" or the "College") is a world renowned institution of higher learning offering associate and baccalaureate degrees in, *inter alia,* the fashion trades.* Petitioner is a member of the faculty of FIT.

Petitioner was hired by FIT as an instructor-technologist in 1956 and was promoted to the rank of instructor in 1962. She continued to work as an instructor until February 1, 1963 when she requested and was granted a one-

* On April 21, 1944, the Educational Foundation for the Apparel Industry, an educational corporation, was granted an Absolute Charter by the Regents of the State University of New York for the purpose of establishing the Fashion Institute of Technology.

year maternity leave of absence. In January, 1964, petitioner requested and received a one-year extension of her maternity leave, the maximum time allowable for any leave under FIT's bylaws then in effect, to and including January 31, 1965. After the expiration of her extended maternity leave, petitioner voluntarily elected not to return to her teaching duties at the College. Having failed to return in timely fashion from an approved leave of absence, petitioner was deemed to have resigned from the College's faculty.

The College's bylaws that were in effect at the time she requested the extension of her original maternity leave provided as follows:

> "Faculty members who resign shall be eligible for reinstatement in the same rank within ten years and reemployment by the President *within his discretion.*" (Emphasis added).

Petitioner first returned to teach at the College in September, 1967, nearly four years after she commenced her maternity leave and more than two and one-half years after the expiration of the leave. She was hired as a part-time faculty member without tenure to teach a single course for three hours per week for the fall semester only.

Petitioner returned to teach on a full-time basis in February, 1973 when the College's President, Marvin J. Feldman, exercising the discretion vested in him by the bylaws reinstated her with tenure. More than eight months later, she filed a grievance under the collective bargaining agreement between FIT and the United Federation of College Teachers in which she protested the loss of her tenure rights

and alleged that she had been placed on the wrong step of the salary scale for assistant professor when she was reinstated in 1973. After four days of hearings, Arbitrator Stephen J. Goldsmith denied the grievance in all respects. Petitioner never moved in the New York State Supreme Court to vacate or set aside the Arbitrator's adverse award.

Instead, on May 4, 1977, petitioner commenced an appeal to respondent Commissioner of Education of the State of New York. By Decision dated September 28, 1977, the Commissioner dismissed the appeal in all respects (10a).* The Commissioner concluded that New York Education Law Section 310(7) conferred jurisdiction upon him to hear only those controversies pertaining to schools within the "common school system" of the State of New York. Since FIT was a community college governed by its own board of trustees and operated under the auspices of the Board of Trustees of the State University of New York, he held that FIT was not a part of the common school system as defined by New York statutory and case law and, therefore, he lacked subject matter jurisdiction to decide the controversy.

On December 29, 1977, petitioner commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules in the Supreme Court, Special Term, Albany County to review the Commissioner's decision. By decision dated March 3, 1978, Justice John T. Casey affirmed the Commissioner's determination and directed entry of judgment dismissing petition to review. Justice Casey held that the Commissioner was neither arbitrary nor capricious in determining that he had no subject matter jurisdiction

* References are to pages of petitioner's appendices.

under Education Law Sections 310 or 2587. Petitioner's moving papers in the Article 78 proceeding alleged no violation of any provision of the United States Constitution. To the contrary, she alleged only that the Commissioner misinterpreted the relevant provisions of the New York Education Law. On March 10, 1978, judgment was entered dismissing the petition (4a-6a).

Petitioner then appealed the judgment to the Appellate Division of the New York State Supreme Court, Third Judicial Department. The Appellate Division unanimously affirmed the judgment of the Supreme Court, Special Term, without opinion, and with costs to the respondents.

Petitioner moved for leave to appeal to the New York Court of Appeals pursuant to New York Civil Practice Law and Rules, Section 5602. On December 17, 1979, the New York Court of Appeals denied the motion for leave to appeal with costs to respondents. The order of the Court of Appeals was entered on December 17, 1979.

Reasons for Denial of the Petition

POINT I

The judgment of the New York Court of Appeals rests upon an independent and adequate state ground.

The fundamental issue pressed by petitioner in the courts below involved the interpretation and judicial construction of Sections 310 and 2587(9) of the New York State Education Law. Section 310 of the Education Law confers jurisdiction upon the Commissioner of Education to entertain and determine appeals by a party conceiving himself aggrieved by an official act or decision of any official or school authority within New York State's common school system. Section 2587(9) provides for an appeal to the Commissioner by a person granted tenure when charges have been filed against such person in accordance with the procedures set forth therein *and* the Board of Trustees of FIT has imposed a penalty or punishment against the aggrieved person. The decision of the Commissioner that he lacked jurisdiction to hear petitioner's appeal under either section of the Education Law was premised solely upon his interpretation of state law. The Commissioner's determination confining his jurisdiction to matters within the common school system was subsequently upheld by Justice Casey in the Supreme Court, Special Term, Albany County, the court of original jurisdiction, and the two appellate courts which reviewed Special Term's judgment on appeal.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based

upon an adequate and independent nonfederal or state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636 (1874); *Berea College* v. *Kentucky,* 211 U.S. 45, 53 (1908); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U.S. 157 (1917); *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965); R. Stern & E. Gressman, Supreme Court Practice §§3.31, 3.32 at 230-233 (5th ed. 1978).

Perusal of the judgments below and Justice Casey's decision foreclose any argument that the judgment petitioner asks this Court to review was based upon a ground other than a nonfederal ground. In fact, as we show more fully below, petitioner never did assert a federal claim in the court of original jurisdiction. The judgment sought to be reviewed rests squarely on statutory construction of the Education Law and is supported by well established decisional law holding that the Commissioner's jurisdiction is limited to disputes that pertain to common school matters. *Bowen* v. *Allen,* 17 A.D. 2d 12, *aff'd w/o opinion,* 13 N.Y. 2d 663 (1963); *Pallilo* v. *Nyquist,* 63 Misc. 2d 912 (Sup. Ct. Albany Co. 1970); *Matter of Cleveland Mack* 11 Ed. Dept. Rep. 123 (1971); *Matter of Roode,* 9 Ed. Dept. Rep. 65 (1967). In reality, petitioner is asking this Court to construe the Education Law contrary to the construction given to it by the New York Court of Appeals. However, established Supreme Court precedent makes it clear that it is not the function of this Court to construe a state statute contrary to the construction given it by the highest court of a state. *Landmark Communication, Inc.* v. *Virginia,* 435 U.S. 829, 837 Fn. 9 (1978); *O'Brien* v. *Skinner,* 414 U.S. 524, 531 (1974).

Even assuming, arguendo, that the issue goes beyond a mere disagreement over statutory construction and petitioner did raise a federal question in the courts below, the fact that the Court of Appeals judgment rests on an unambiguous, adequate and independent State ground precludes further review by this Court. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945).

The rationale for the Court's declination of jurisdiction where an adequate state ground exists is succinctly set forth in *Herb* v. *Pitcairn, supra* at 125-126:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

It is apparent that petitioner elected to bring her claim in the wrong forum. Nevertheless, a state court decision that a party has elected the wrong choice of forum or remedy constitutes an adequate state ground for a judgment that necessarily precludes Supreme Court review of a federal question. *Edelman* v. *California*, 344 U.S. 357 (1953); *Parker* v. *Illinois*, 333 U.S. 571 (1948); *Copperweld*

Steel Company v. *Industrial Commission of Ohio*, 324 U.S. 780 (1945), *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *McQuade* v. *Inhabitants of Trenton*, 172 U.S. 636 (1899); *Farson, Son & Company* v. *Bird*, 248 U.S. 268 (1919). Consequently, this Court has no jurisdiction to consider the alleged federal question that petitioner attempts to raise.

Petitioner's assertion that she was compelled to bring an appeal to the Commissioner before pursuing her alleged federal claim in the State Supreme Court or the United States District Court simply cannot withstand scrutiny. Petitioner had several options available to her which she failed inexplicably to exercise. For example, she could have moved in the State or Federal courts to vacate or set aside the arbitration award which explicitly rejected her claims that FIT abridged her tenure rights. Second, she could have pursued her claims under 42 U.S.C. §1983 either in State Court or in the appropriate United States District Court. Finally, she could have commenced a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules to review FIT's refusal to reemploy her in 1968. All of these possible avenues to adjudicate whatever rights she might have had are now time-barred.

POINT II

Petitioner failed to present a federal question in the trial court and in the instant petition.

a. The petition does not present a federal question.

This Court's power to review final judgments rendered by the highest court of a state by way of a writ of certiorari is circumscribed by 28 U.S.C. 1257(3). Petitioner does not question the validity of a treaty or statute of the United States. Nor does the petition assert that Education Law Sections 310 or 2587 are repugnant to the United States Constitution or treaties or statutes of the United States. Instead, petitioner asserts that this Court has jurisdiction under the third prong of 28 U.S.C. 1257 because she has been denied a property right without due process of law in violation of the Fourteenth Amendment to the Constitution. The due process claim is premised upon a mistaken belief that FIT violated her tenure rights when it declined to offer her full-time employment after she completed a one-semester assignment as a part-time faculty member in 1968.

It is axiomatic that petitioner must first show that she possessed a property right before she can claim a deprivation thereof. In fact, the record discloses that petitioner blithely ignores the fact that at the time the alleged due process violation took place, petitioner was an untenured teacher. Petitioner candidly admits in the petition (p. 3) that she "overstayed" her maternity leave. More significantly, she conceded at the arbitration proceeding and the Arbitrator found that:

> "Lapse or expiration of the maternity leave on or about February 1, 1965 is agreed by the parties to have constituted a (constructive) resignation".

Contrary to petitioner's belated contention that she was unlawfully deprived of her tenure rights, New York law makes it abundantly clear that the termination of the employment status of an individual who does not return from a leave of absence does not involve a violation of tenure rights. *Matter of Thomas* v. *Board of Education of Oceanside, UFSD,* 58 A.D. 2d 584 (2d Dept. 1977); *Matter of Fink,* 11 Ed. Dept. Rep. 67 (1971). Indeed, subdivision (1)(d) of Section 2587 defines "tenure" as the right to hold a position "during good behavior and efficient and competent service . . ." Clearly, the right to remain tenured does not survive interminably once an individual resigns from employment and thereby fails to render "efficient and competent service" to her employer. See *Doering* v. *Hinrichs,* 289 N.Y. 29 (1942); *Thomas* v. *Board of Education of Oceanside, UFSD, supra; Shapiro* v. *Board of Education of City of New York,* 248 A.D. 601 (2d Dept. 1936); *Winkel* v. *Teachers Retirement System of City of New York,* 149 N.Y.S. 2d 443 (Sup. Ct. Kings Co. 1956); *Walter* v. *Board of Education of Fallsburgh,* 25 Misc. 2d 616 (Sup. Ct. Spec. T. Sullivan Co. 1960). Having resigned her employment with FIT and lost whatever tenure she may have had, petitioner cannot now be heard to complain that she was deprived of due process of law since she had no tenure rights when she completed her part-time teaching assignment in 1968.

Moreover, petitioner's reliance upon the provisions of Education Law Section 2587(9) is misplaced. That section

provides for an appeal to the Commissioner only when a teacher is removed from tenured employment by FIT after charges have been brought and the Board of Trustees has held a hearing and fixed a penalty. It is clear that petitioner has never been dismissed, disciplined, penalized or denied tenure by FIT's Board of Trustees. Nor has FIT's President or Board of Trustees ever preferred charges against her to remove her from tenured employment. Indeed, the only minimal relevance Section 2587 has to Zangrillo's claims is based upon her assertion that FIT allegedly violated her "tenure rights" when it properly concluded that she had resigned, a fact which she concedes, and had removed herself from tenured employment when she failed to return to employment upon the expiration of her extended leave of absence on February 1, 1965.

In the absence of any federal question, the petition for a writ of certiorari to the Court of Appeals of New York should be denied.

b. Petitioner failed to follow the correct procedure under New York law for raising a federal question.

The petition should be denied for another equally compelling reason. Assuming, for the sake of argument, that the petition does present a federal question, the record is unequivocal that petitioner failed to follow New York procedural law by not raising the federal question at the appropriate stage of the state court proceedings below.

Examination of the moving papers in the Article 78 proceeding petitioner commenced in the State Supreme Court, Albany County, fails to disclose any mention of the

due process clause of the Fourteenth Amendment to the United States Constitution. Similarly, the instant petition does not affirmatively state that the constitutional arguments asserted therein were first made in the court of original jurisdiction. Perhaps aware of this fatal infirmity, petitioner admits in her Statement pursuant to Rule 23(f) of the Supreme Court Rules, that she considered the constitutional issues to be of "peripheral significance" (petition at p. 17) and that her argument focused upon the correct statutory construction to be given to Education Law Sections 310 and 2587. In fact, petitioner asserted no claim under the Fourteenth Amendment.*

The law in New York is well settled that an appellate court will not entertain a federal question that was not properly raised and presented in the trial court. *Hamilton Mutual Realty Fund* v. *Band Realty Co.*, 41 N.Y. 2d 939 (1977); *Brown* v. *Brown*, 34 A.D. 2d 727 (4th Dept. 1970); *Peasley* v. *Reid*, 57 A.D. 2d 998 (3rd Dept. 1977); *Purdy* v. *Erie Railroad Co.*, 162 N.Y. 42 (1900), *aff'd* 185 U.S. 148 (1902).

This Court has consistently held that it lacks jurisdiction to review a final judgment of the highest state court where no federal question was raised or specially set up at the trial court level as required by settled state practice.

---

* Petitioner's fleeting reference to the "Civil Rights Law of 1964, decisional rulings and later enactments" in the moving papers in the initial appeal to the Commissioner is not sufficient to preserve the federal question for the Supreme Court's review. *Herndon* v. *Georgia*, 295 U.S. 441 (1935); *Bowe* v. *Scott*, 233 U.S. 658 (1914); *Harding* v. *Illinois*, 196 U.S. 78 (1904); R. Stern and E. Gressman, Supreme Court Practice §3.26 at p. 210. Even these legally insufficient statements were not asserted in the moving papers before the Supreme Court, Albany County.

Bowe v. *Scott,* 233 U.S. 658 (1914); *Purdy* v. *Erie Railroad Co.,* 185 U.S. 148 (1902); *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291 (1902); *F. G. Oxley Stove Co.* v. *Butler County,* 166 U.S. 183 (1897).

In *Purdy* v. *Erie Railroad Co., supra,* a case originating in New York, this Court commented upon the New York Court of Appeals' refusal to review a constitutional issue not hitherto presented to the trial court:

> "In so holding the court followed the settled rule of practice in that State. On that practice alone was based its refusal to consider a federal question not brought to the attention of the trial court." 185 U.S. at 153.

The Court concluded that petitioner's failure to comply with state procedural law was sufficient basis for declining to review the Court of Appeals' judgment:

> Now, where a party drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgement of the highest court of a state denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment, and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice. 185 U.S. at 154.

From the foregoing, it is evident that petitioner may not attempt to raise the Fourteenth Amendment argument in this request for a writ of certiorari.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARC L. SILVERMAN
Attorney for Respondent
President and Board of Trustees of
Fashion Institute of Technology
40 West 57th Street
New York, New York 10019
(212) 977-9700

MICHELLE S. GRUDER
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. 79-1444

FRANCES LETO ZANGRILLO,

Petitioner,

-against-

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner's Reply Brief

MILTON HOROWITZ
Counsel for Petitioner
15 Park Row
New York, New York 10038
(212) COrtlandt 7-0606

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TELEPHONE: (212) 447-5358

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PETITIONER'S REPLY BRIEF

Statement

This brief if submitted in reply to the briefs of respondents Gordon M. Ambach as Commissioner of Education of the State of New York ("Commissioner") and the President and Board of Trustees of Fashion Institute of Technology ("FIT").

The complete official citation of the judicial case below is *Matter of Zangrillo v. Ambach,* 70 AD2d 790 (Appellate Division, Third Department, 1979), motion for leave to appeal

denied, 48 NY2d 611 (1979). The administrative decision is reported in the New York State Education Reports as *Appeal of Frances Leto Zangrillo,* 17 Ed. Dept. Rep. 98 (1977).

We apologize for the error in our petition at page 19, third line from the bottom, where we state the date of petitioner's termination as January 31, 1965. It should have read January 31, 1968.

ARGUMENT

POINT I

Petitioner Had Been Reinstated and Promoted in Rank in Full Compliance with her Public Employer's Reinstatement Bylaw Before She Was Summarily Terminated After A Semester's Teaching

Respondents' briefs leave intact and uncontested the facts that petitioner, as a tenured teacher at FIT, went out on maternity leave effective February 1st, 1963 and did not return when the leave, as extended, expired at the end of January 31, 1965; that in the summer of 1967 petitioner's department chairman promised her the first full-time opening if she would teach part-time in the Fall 1967 semester (Petition, p. 21); and that accordingly petitioner resumed teaching at FIT in September 1967 only to be dropped from faculty as of January 31, 1968 (Petition, p. 13a).

Both respondents lay great stress on the theory that petitioner's failure to return from leave by February 1st, 1965 caused her tenure to be forfeited. Thus the Commissioner's Brief at p. 12:

> "Petitioner's arguments with regard to an alleged violation of her rights pursuant to subdivision (8) and (9) of section 2587 of the Education Law simply ignore the fact that she failed to return from her extended maternity leave in 1965, and that such failure to return constituted a constructive resignation of her position with a loss of her tenure rights."

And FIT's Brief, seeking to make the most of conclusory statements in an arbitration proceeding, states at pp. 10, 11:

> " * * * Petitioner candidly admits in the petition (p. 3) that she 'overstayed' her maternity leave. More significantly, she conceded at the arbitration proceeding and the Arbitrator found that:
>
> 'Lapse or expiration of the maternity leave on or about February 1, 1965 is agreed by the parties to have constituted a (constructive) resignation'."

In this connection the Commissioner's Brief, at p. 11, says:

> "Petitioner's real grievance with respondent board of trustees was caused by a change in respondent's policy of reinstatement from one of unqualified eligibility for reinstatement in the same rank within 10 years, to a policy of reinstatement in the discretion of president of the institution . * * * "

And here the Commissioner's Brief makes a seriously misleading error in its statement of the case, p. 5:

> " * * * Upon her [petitioner's] failure to return from maternity leave, petitioner was deemed to have submitted her resignation. The bylaws of the institution, which had provided for an unqualified right of reinstatement within ten years after the resignation of a faculty member, were amended *prior* to petitioner's maternity leave to provide that faculty members who resign shall be eligible for reinstatement in the same rank within ten years, and re-employment by the President within his discretion." (emphasis added to stress the inaccuracy)

To correct the error while preserving its effect, FIT's Brief says at p. 5:

"The College's bylaws that were in effect at the time she [petitioner] requested the extension of her original maternity leave provided as follows:

'Faculty members who resign shall be eligible for reinstatement in the same rank within ten years and reemployment by the President within his discretion.' (Emphasis added)."

At the time of petitioner's departure on maternity leave effective February 1st, 1963 and for several years prior thereto, the reinstatement bylaw of FIT read:

"Faculty members who resign shall be eligible for reinstatement in the same rank within ten years."

And it was not until October 14, 1963, about eight months after her baby was born, that the bylaw was amended to add the phrase:

"and reemployment by the President within his discretion." (Petition, p. 13a)

It follows therefore that it is literally true that the amendment of the bylaw had been made and was in place when petitioner, at home with her infant, applied for the extension of the leave to cover the period from February 1, 1964 to January 31, 1965.

But the cream of a very cruel jest is that, in her restoration to faculty effective the September 1967 semester, and putting to a side the contractual impact, additional to that of the tenure statute and the reinstatement bylaw, of FIT's promise to give petitioner the first available full-time opening, petitioner returned to faculty in complete compliance with and fulfillment of all requirements of the reinstatement bylaw, both in its original and amended versions.

Thus, instead of achieving "reinstatement in the same rank" — and surely the tenure status of an individual is a component of his rank — as provided by both versions of the reinstatement bylaw, petitioner was promoted to the rank of adjunct assistant professor and, with the approval of the college president, given a teaching position in her department. Thus, the notification letter of FIT's dean and vice president:

"August 29, 1967

Dear Mrs. Zangrillo:

We are recommending your name *to the president for his certification to our Board of Trustees* for assignment as an adjunct assistant professor in the Apparel Design Department for the Fall semester as of September 1967.

* * * * * " (emphasis supplied)

We believe that the case for petitioner's property right in her tenure as of January 31, 1968 at FIT, tenure rights as created, defined and protected by the New York Education Law §2587 (Petition, pp. 5-8) is compelling, and that the violation of those rights by FIT's summary termination action of January 31, 1968 plus the denial to her of any review of the merits of that termination, administrative or judicial, constitute a substantial deprivation of petitioner's property without due process of law within the meaning of the Fourteenth Amendment of our federal constitution.

POINT II

Respondents' Attempts, After Foreclosing Her Right to be Heard, to Demonstrate Substantive Defenses to her Claims, Disclose a Settled Hostility to Fair Adjudication of her Claims Without Prejudgment

Unmistakeably adversary is the array of alternate courses suggested by respondents for petitioner (Commissioner's Brief, pp. 8, 13-15; FIT Brief, p. 9) whom, they suggest, with notable lack of charity, was always wrong in her choice of remedies and always late in getting there. Yet when these alternate suggested courses are examined — direct judicial suit under Education Law §2587, invocation of the State Executive Law for either an administrative proceeding to the State Division of Human Rights or judicial action in State Supreme Court; judicial application to set aside an arbitration award incapable of binding a party against the tenure mandant of a statute, and finally, suit under 42 U.S.C. §1983 either in the district court or in the State court — none seem to go as directly to petitioner's litigating objective as the tenure statute, Education Law §2587, with its seeming grant of an exclusive review jurisdiction to the Commissioner.

Needless to say the litigating advice given by petitioner's adversaries leaves plenty of room for effective defense. A good example is furnished at page 13 of the Commissioner's Brief:

> "The most appropriate method to review the refusal of the Fashion Institute of Technology to re-employ petitioner, particularly in view of petitioner's reliance upon the provisions of section 2587 of the Education Law, would have been by a special proceeding in the State Supreme Court commenced pursuant to the provisions of Article 78 of the Civil Practice Law and Rules."

Aside from the fact that such a course was taken in the second cause of action pleaded in the proceeding to review the

Commissioner's rejection of jurisdiction with consequent dismissal "on the merits" (Petition, pp. 14, 15; 6a), one can readily imagine both a court's reaction to the statute's exclusive grant of review jurisdiction to the Commissioner (Petition, p. 7) as complemented by Education Law §308 (petition, p. 8), saying of the Commissioner,

> "*** it shall be his duty to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof ***."

It would hardly be likely that a court would decree relief in such a situation and the result might be as prejudicial to petitioner's claims as the actuality in Supreme Court, Albany County (Petition, pp. 4a-6a).

In spite of the bugaboo of state grounds of decision precluding a review for claimed federal constitutional violations, petitioner must perforce rely on this Court's observation in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 82 (1978):

> "*** Because property interests are creatures of state law, Perry v. Sindermann, 408 U.S. 593, 599-603, respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law.***"

And in thus relying on the statute that created and protected her property interest of tenure at FIT, petitioner took what was probably the only valid course open to her for the establishment and enforcement of her statutory property rights, and the enforcement of federal due process guarantees should state agencies—her employer, the Commissioner, the State courts—fail to accord her her federal due.

In the light of a situation where the property interest sought to be protected is a creature of state law, and a statutory creation at that, obviously such rights must be enforceable primarily

as statutory rights in statutorily prescribed modalities which was exactly what petitioner did in an exhaustive line of review. In such a case we feel that the federal 14th Amendment due process guarantees and protections are sufficiently robust to be deemed invoked and not defeated when, as here, rather than hypothesizing an anticipated constitutional violation inherent in the destruction of the statutory property right sought to be enforced, it is pointed out to both the Commissioner and Special Term of Supreme Court, Albany County that the rights sought to be enforced in the litigation have a constitutional foundation. And when and if action violative of constitutional rights is taken—as, for example, when Special Term made its judgment foreclosing any administrative or judicial review of FIT's summary termination action of January 31, 1968 (Petition, pp. 4a-6a), it then becomes appropriate to make such explicit objection on specified constitutional grounds as the occasion requires. The litigating course taken by petitioner was, in its origins, statutory rather than constitutional under a common sense principle that decries unnecessary escalation of a statutory issue into a constitutional one. By the same token the litigant does not lose his constitutional protections unless the occasion presents a situation where they clearly should be invoked but are not.

The treatment by the Commissioner of the issue of limitations—after he has declined jurisdiction—is very one-sided. In a range of limitations from 4 months through one year to six years for a suggested list of litigating alternatives, all starting from the termination of January 31, 1968 and going to May 4, 1976,* the starting date of the administrative appeal to the Commissioner, manifestly the time gap is too great, on the Commissioner's formulae, to be timely. But the Commissioner assumes that limitations make no provision for a situation of contemporaneously concealed facts which later discovery uncovers—precisely the situation that befell the petitioner.

*Erroneously, both the Justice at Special Term (Petition, p. 9a) and FIT in its Brief at p. 4, make 1977 the starting date of the administrative appeal.

Petitioner had been let go as of January 31, 1968 on the pretext that no work was available but that she should inquire about openings from time to time, but:

> "*** she still sought full-time employment at F.I.T. but without success.
> "In the Spring of 1972, having been passed by for reemployment while others were hired, Mrs. Zangrillo retained counsel to assist in pressing her claim for reemployment." (Petition, pp. 21, 22)

Unaware, or at least unable to prove the discriminatory nature of the January 31, 1968 separation, when petitioner was reinstated for the second time in February 1973 and received the pay of an assistant professor on the first salary step, she shortly initiated the collective bargaining grievance procedure seeking the pay of an assistant professor on the fourth salary step. Contrary to FIT's assertion at page 3 of its Brief, petitioner did not in her filed grievance or at any early stage protest "the loss of her tenure rights" for the reason that she was in no position to prove, at that time, that the layoff of January 1968 ostensibly for lack of available work, was, in fact, a termination in favor of untenured newcomers illegally discriminatory as to her tenure rights.

It was only in the course of the arbitration proceedings resulting in an adverse award of March 22, 1976 that the internal Memorandum to the College President of June 22, 1972 (Petition, pp. 13a, 14a; Appendix C) was discovered to her with its pithy, brutal notation:

> "At the end of that semester, she was dropped, January 31, 1968."

And, of course, its self-righteous exposition of "rights and seniority voluntarily given up to stay home"; and "The other Part-Time members of the department were felt to have seniority if any full-time openings became available", gave petitioner smarting insight into just how trustworthy was the inducing pro-

mise of an FIT department chairman to give her the next full-time opening.

Between the discovery in the arbitration ending March 22, 1976 and the appeal to the Commissioner of May 4, 1976 is, of course, but a few weeks. But the implications of that discovery shed light on the utter fraud upon her valuable property rights in concealing the permanent, illegal termination with the trappings of a layoff for lack of work, soothingly asking her to inquire from time to time and always, falsely, telling her that no openings had presented, while, at the same time, quietly moving the favored and untenured part-time and evening people into full-time positions.

The Commissioner, charged with quasi-judicial function of hearing and adjudicating administrative appeals, has, in his Brief, found only limitations which would bar the claim were he constrained to exercise jurisdiction. Nowhere does he mention New York Civil Practice Law and Rules §203(f):

> "(f) Time computed from actual or imputed discovery of facts. Except as provided in article 2 of the uniform commercial code, * * * where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

and while mentioning CPLR §213(1), the six year limitations for statutory actions such as enforcing Education Law §2587, he does not mention section 213(8), the six year limitations for fraud:

> "8. An action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

Of the interaction of CPLR §203(f) with §213(8), in *Government of India v. Cargill, Inc.*, 445 F.Supp. 714 (S.D.N.Y. 1978), Tenney, D.J., observed at p. 720:

> "Parallel principles of justice apply in New York to the limitation of an action for fraud. The mandates of both N.Y.C.P.L.R. §203(f) and §213(8) govern the time limitations for institution of claims based on that tort, and the two have been construed together to provide for alternate limitations where discovery of fraud is delayed; the plaintiff has two years from discovery or six years from accrual, whichever is longer. ***"

At this point we think that what may appear to be a diversion actually fits in. The Commissioner's Decision of September 28, 1977 (Petition, pp. 10a-12a; 17 Ed. Dept. Rep. 98) attempts to downgrade the issue presented to him from petitioner's prayer for a make-whole remedy for the violation, on January 31, 1968, of her tenure rights under §2587 of the Education Law, to a mere non-statutory squabble "with regard to salary" disposable under the doctrine of *Matter of Bowen v. Allen*, 17 AD2d 12, affd. no opinion, 13 NY2d 663 (1963), but avoiding the appearance of turning the case into a judicial repeal of statutes requiring the Commissioner to enforce *any* statutory provision of the Education Law. Thus the opening sentence of his Decision:

> "This appeal concerns the appropriate placement of petitioner on the salary schedule for assistant professors employed by the Fashion Institute of Technology."

Nowhere in his Decision does the Commissioner as much as mention Education Law §2587 nor the fact that the whole thrust of the administrative appeal was to have him enforce the statute. And notwithstanding that the Justice at Special Term said in his memorandum decision (Petition, p. 9a):

"*** petitioner commenced an appeal before the Commissioner of Education wherein she claimed that *** Fashion Institute of Technology, violated the provisions of Section 2587 of the Education Law.***",

the Commissioner's Brief persists in refusing to regard the matter on the terms and premise which it presented to him, viz., his duty under Education Law §§2587(9) and 308 to hear and enforce petitioner's *statutory* claims. Thus, the Commissioner's Brief at pp. 11, 12:

"The ongoing dispute between petitioner and respondent board of trustees concerns the appropriate placement of petitioner on respondent's salary scale, for which petitioner appealed to the Commissioner. Although petitioner continues to allege a violation of the provisions of section 2587 of the Education Law, it is respectfully submitted that section 2587 is irrelevant to the dispute between petitioner and her employer, and that her cause of action is in reality premised upon the provisions of the contract between the Fashion Institute of Technology and the collective bargaining unit representing the teachers at such institution. The gist of petitioner's complaint is that she was not offered full-time employment at the appropriate level when she desired to be reinstated as a teacher at Fashion Institute of Technology. Such reinstatement is not dependent upon the provisions of section 2587, ***"

The distortion done by the Commissioner's version of the facts as well as the position of petitioner with regard to limitations are made crystal clear by the allegations of the petition initiating the administrative appeal to the Commissioner. Thus:

"8. Notwithstanding that, under the provisions of section 2587 of the Education Law, I could not be removed and separated from my tenure except under the procedures and for the reasons therein specified, I was dropped from the faculty at the end of the September 1967 through January 1968 semester. The fact that I was illegally dropped was concealed from me; I inquired frequently for employment and was told each time that

nothing had opened up. I did not learn of this deliberate violation of my statutory tenure rights until a memorandum of June 22, 1972 prepared for President Feldman by the then Chairman, Prof. Hilda Friedman (Grievant's Exhibit W, annexed hereto) first became available to me in an arbitration hearing session, after which the arbitrator concluded that my claims with respect to discriminatorily illegal treatment were 'now time-barred'."

And if, speaking to limitations again, the Commissioner were to argue that limitations based on discovery apply only to the narrow confines of an action for fraud and deceit, he would, as an administrative adjudicator, be ignoring the fact that the real question tendered in the case on the issue of limitations was whether an illegal discrimination in violation of personal property rights created, granted and protected by statute, and of which the owner may not constitutionally be deprived without due process of law, is to be perpetuated and made a success because successfully concealed during the period of limitations, or whether the remedial statute as well as the constitutional protection may still be vindicated and the discrimination undone by timely action following discovery.

In law, the type of concealment that saps one's right of tenure, or any other kind of property, is an estoppel creating phenomenon with respect to limitations. Thus in *Government of India v. Cargill, Inc.*, 445 F. Supp. 714 (S.D.N.Y. 1978), at p. 719:

"The doctrine of equitable estoppel in New York derives directly from *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), the holding of which is expressed in the simple maxim that 'no man may take advantage of his own wrong.' *Id.* at 234. The New York Court of Appeals forthrightly adopted *Glus* in *General Stencils, Inc. v. Chiappa,* 18 N.Y. 2d 125 (1966).***"

Nor is the principle of equitable estoppel with respect to limitations any longer a matter only of case law. For the principle has its statutory embodiment in the New York General

Obligations Law §17-103, dealing with agreements waiving the Statute of Limitations, and providing in subsection (4)(b) thereof:

"4. This section

***

b. does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitations; ***"

Nor should a continuing wrong stemming from her illegal deprivation, without the due process of the tenure statute's required hearing on charges and without an administrative or judicial review of the merits of FIT's termination action of January 31, 1968, be allowed to blight petitioner's career so that 24 years after she started teaching at FIT, petitioner is still an assistant professor—one rank over her starting rank—while every one of her contemporaries, with or without overstayed maternity leaves, has long reached the top step of the top rank of full Professor.

We respectfully renew our prayer that a writ of certiorari be granted herein.

Dated: New York, New York
May 21, 1980.

Respectfully submitted,

MILTON HOROWITZ,
Counsel for Petitioner
15 Park Row
New York, New York 10038
(212) COrtlandt 7-0606